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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: Chapter 11  
  
CEDAR CHEMICAL CORPORATION and Case Nos. 02-11039 (SMB) and  
VICKSBURG CHEMICAL COMPANY, 02-11040 (SMB)  
  
Debtors. Jointly Administered  
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**MOTION FOR AN ORDER FIXING DATES, TIMES AND PLACE OF  
HEARINGS ON MOTION FOR FURTHER ORDERS PURSUANT TO,  
INTER ALIA, SECTIONS 105, 363(b), 363(f), 363(m) and 365 OF THE  
BANKRUPTCY CODE AND RULES 2002, 6004, 6006, 9002, 9007 AND  
9008 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE:  
(i) AUTHORIZING THE DEBTOR TO SELL CERTAIN ASSETS FREE  
AND CLEAR OF LIENS AND CLAIMS TO WESTRADE USA, INC. OR  
TO ANY BIDDER SUBMITTING A HIGHER OR BETTER OFFER  
PURSUANT TO THE TERMS OF A PURCHASE AGREEMENT; (ii)  
AUTHORIZING THE DEBTOR TO ASSUME AND ASSIGN CERTAIN  
EXECUTORY CONTRACTS TO WESTRADE USA, INC. AND TO  
REJECT CERTAIN EXECUTORY CONTRACTS; (iii) APPROVING A  
BREAK-UP FEE AND BIDDING PROCEDURES; (iv) FIXING MANNER  
AND EXTENT OF NOTICE OF SALE HEARING; (v) AUTHORIZING  
THE EXEMPTION OF THE SALE FROM THE PROVISIONS OF  
BANKRUPTCY RULES 6004(g) AND 6006(d), AND (vi) GRANTING  
RELATED RELIEF**

The Motion ("Motion") of Cedar Chemical Corporation, debtor and debtor-in-possession  
herein ("Cedar"), by its attorneys Angel & Frankel, P.C., respectfully represents as follows:

## **INTRODUCTION**

1. This Motion is brought pursuant to, *inter alia*, sections 105, 363(b), 363(f), 363(m) and 365 of title 11, United States Code (the “Bankruptcy Code”) and Rules 2002, 6004, 6006, 9002, 9007, and 9008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

2. In the first instance Cedar requests that the Court enter an order substantially in the form annexed hereto as Exhibit “A” (the “Notice Order”), scheduling two hearings: first, a hearing (the “Procedures Hearing”) to be scheduled as soon as possible to consider approval of the procedures for the sale of certain assets of Cedar to Westrade USA, Inc. (“Westrade”) as set forth in the Purchase Agreement (the “Agreement”) annexed hereto as Exhibit “B”. At the Procedures Hearing, Cedar will seek the entry of an order substantially in the form annexed hereto as Exhibit “C” (the “Procedures Order”), *inter alia*, approving bidding procedures and notice provisions, and granting Westrade a break-up fee (the “Break-Up Fee”).

3. The second hearing (the “Approval Hearing”) is requested pursuant to, *inter alia*, sections 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006. At the Approval Hearing, Cedar will request entry of an order substantially in the form annexed hereto as Exhibit “D” (the “Approval Order”) (a) authorizing it to sell certain of its assets to Westrade or to such other entity which submits a higher or better bid for these assets, (b) authorizing Cedar to assume and assign certain executory contracts to Westrade, and to reject a certain contract, and (c) excepting the sale from the provisions of Bankruptcy Rules 6004(g) and 6006(d).

## **BACKGROUND**

4. On March 8, 2002 (the “Petition Date”), Cedar, together with its wholly-owned subsidiary Vicksburg Chemical Company (“Vicksburg”; collectively, the “Debtors”) filed

voluntary petitions for relief under chapter 11 of the Bankruptcy Code and an order for relief under section 301 of the Bankruptcy Code was simultaneously entered in this case.

5. The Debtors have been authorized to remain in possession of their property and to continue managing their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

6. An official committee of unsecured creditors has been appointed in Debtors' case and has retained the law firm of Satterlee Stephens Burke & Burke, LLP as its counsel.

7. Cedar has a 49% membership interest and a 50% profit/loss interest in RiceCo LLC, a Delaware Limited Liability Company ("RiceCo"). Cedar's membership and profit/loss interest in RiceCo emanates from the Amended and Restated Limited Liability Company Agreement of RiceCo, LLC dated April 29, 2000 between Cedar and Griffin LLC (the "LLC Agreement"). As provided for in the LLC Agreement, Cedar is also party to two other agreements with RiceCo. First, Cedar is a party to a manufacturing agreement dated April 29, 2000 by and among it, RiceCo and Griffin LLC (the "Manufacturing Agreement"), whereby Cedar and Griffin each produce and sell to RiceCo 50% of RiceCo's requirements for the product known as "propanil". In addition, Cedar and RiceCo are parties to a services agreement dated August 5, 1997, and amended April 29, 2000 (the "Services Agreement"),<sup>1</sup> whereby Cedar provided management and administrative services to RiceCo at the premises occupied by Cedar and RiceCo in Memphis, Tennessee<sup>2</sup>.

8. Cedar believes that its interest in RiceCo, including its interest in the LLC Agreement and the Manufacturing Agreement, are valuable assets of its estate. Since Cedar is

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<sup>1</sup> Due to the voluminous nature of the LLC Agreement, the Manufacturing Agreement and Services Agreement, the same are not annexed hereto, but are available upon request from Cedar's counsel.

<sup>2</sup> Cedar recently received Court approval to reject its lease for that premises and enter into a new lease for a much smaller portion of the premises.

no longer operating, Cedar sought a purchaser for its interest in RiceCo. As set forth below, Cedar extensively negotiated a sale of its RiceCo interest to Westrade and, on or about February 5, 2003, entered into the Agreement with Westrade subject to Bankruptcy Court approval. This Motion seeks to set the procedures for the sale to Westrade or such other higher or better bidder, and for approval of such sale by the Bankruptcy Court.

### **THE AGREEMENT**<sup>3</sup>

9. Pursuant to the Agreement, Cedar has agreed to sell to Westrade the following assets (the “Property”):

(a) All of Cedar’s right, title and interest in and to RiceCo, including but not limited to Cedar’s 49% membership interest in RiceCo and 50% profit/loss interest in RiceCo;

(b) Cedar’s rights under the LLC Agreement; and

(c) Cedar’s rights under the Manufacturing Agreement.

The Property does not include (i) any monies, including but not limited to dividends, owed by RiceCo to Cedar for the period prior to the Closing Date, under, in connection with or pursuant to the LLC Agreement, Manufacturing Agreement or otherwise, or (ii) Cedar’s rights under the Services Agreement. All Property is being sold as is, where is, without representation or warranty except as otherwise specified in the Agreement.

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<sup>3</sup> The following is a summary of the terms of the Agreement. The Agreement should be reviewed by interested parties in its entirety. In the event of an inconsistency between the summary herein and the Agreement, the Agreement shall control. Any capitalized term used but not otherwise defined herein shall have the meaning ascribed in the Agreement.

10. The Purchase Price under the Agreement is \$5,500,000, subject to a maximum downward adjustment of \$397,819 as detailed in paragraph 2(c) of the Agreement. Cedar has been paid a deposit of \$550,000 and will be paid the balance of the Purchase Price at Closing in cash. There is no financing contingency. In addition, Westrade will also assume all obligations of Cedar arising after the Closing Date under the LLC Agreement and the Manufacturing Agreement.

11. It is a condition of Closing that Cedar obtain an order of the Bankruptcy Court approving the sale of the Property to Westrade in accordance with the Agreement free and clear of any liens, claims and encumbrances, authorizing the assumption and assignment to Westrade of the LLC Agreement and the Manufacturing Agreement, authorizing rejection of the Services Agreement and approving the Break-Up Fee as discussed below. In the event that such an order is not entered on or before March 22, 2003, Westrade has the right to terminate the Agreement and obtain a return of its deposit.

12. It is also a condition of Closing that there is no material adverse change in the business or financial condition of RiceCo since July 31, 2002. Lastly, Westrade's obligation to close is conditioned upon either the Bankruptcy Court entering an order finding that RiceCo is not a potentially responsible party (a "PRP") in connection with environmental claims by the Arkansas Department of Environmental Quality ("ADEQ") relating to Cedar or its property, or the ADEQ's release of, and agreement not to pursue, its claim that RiceCo is such a PRP. Cedar recently made a motion to the Bankruptcy Court seeking such relief, which motion is returnable on February 27, 2003. That motion is incorporated herein by reference.

### **THE PROCEDURES HEARING**

13. Cedar requests that the Court schedule, as soon as possible, the Procedures Hearing to consider its request for approval of the Break-Up Fee and to establish the bidding procedures and notice provisions for the sale of the Property. Cedar submits that the proposed Break-Up Fee, bidding procedures and notice provisions are reasonable and necessary to obtain the best value for the Property. These fees and procedures are, moreover, consistent with past practices of both this Court and other bankruptcy courts and within the range of fees and type of procedures often approved.

#### **A. Break-Up Fee**

14. The Agreement is conditioned on approval of the payment of a \$150,000 Break-Up Fee in the event that Westrade is not the successful bidder for the Property, provided that Westrade is not otherwise in breach of the Agreement and confirms on the record at the Approval Hearing that it was otherwise ready, willing and able to close in accordance with the terms of the Agreement. Cedar has agreed to the Break-Up Fee as reasonable in light of Westrade's costs and expenses in connection with this transaction.

15. Without the Break-Up Fee, Westrade indicated that it would not enter into the Agreement which is clearly valuable to Cedar's estate. Cedar has not been able to sell the Property to any other entity to date and believes that if the value of the Property is to be preserved, the Break-Up Fee must be approved.

16. Courts evaluate a break-up fee in light of the benefit it confers on a debtor's estate, whether it fosters or hinders competitive bidding, is necessary to attract an initial bidder or "stalking horse" and is reasonably proportionate to the contract purchase price. See, e.g., In re Bidermann Industries, Inc., 203 B.R. 547 (Bankr. S.D.N.Y. 1997). Courts typically consider a break-up fee appropriate if the bidder helped the estate put the property in a "sales configuration

mode” to attract other bidders to the auction. In re Financial News Network, Inc., 126 B.R. 152 (Bankr. S.D.N.Y. 1991). Bankruptcy courts have approved bidding incentives similar to the Break-Up Fee under the “business judgment rule”, which proscribes judicial second-guessing of the actions of a corporation’s board of directors taken in good faith and in the exercise of honest judgment. In re Marrose Corp., Case Nos. 89 B 12171-12179 (CB), 1992 WL 33848 at \*5 (Bankr. S.D.N.Y. 1992) (bidding incentives are “meant to compensate the potential acquirer who serves as a catalyst or “stalking horse” which attracts more favorable offers”). See also In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may be “legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking”) (citation omitted).

17. Cedar submits that the justification for granting break-up fees exists in this case. Westrade is paying substantial consideration **B B** \$5,500,000 **B B**for the Property. Based on the Purchase Price, the Break-Up Fee represents 2.7% of the consideration **B B** a typical percentage granted in both bankruptcy and non-bankruptcy transactions of this nature. Westrade has agreed to acquire the Property knowing that it would be subject to competitive bidding. Westrade was unwilling to risk losing the extensive time and costs of its due diligence and negotiation unless it received a Break-Up Fee.

18. Moreover, it is through Westrade’s negotiation and due diligence that this Property is being brought to the market. Other competitive bidders can rely on the knowledge that Westrade has thoroughly reviewed and negotiated this transaction in making its own competitive bid. This “stalking horse” role is important in sales such as this one and fosters, rather than hinders, competitive bidding. This is especially true considering the fact that the Break-Up Fee is only 2.7% of the consideration being paid. Although other entities have

performed the due diligence to determine whether they had an interest in purchasing the Property, none of those entities has, to date, submitted to Cedar a binding offer which Cedar can bring to the market other than Westrade. The bidding procedures provide a mechanism for increased bids; thus, a floor has been established. Accordingly, even if Westrade is ultimately not the successful bidder, Cedar and its estate will have benefited from the floor established by its bid.

19. Cedar submits that the Break-Up Fee is therefore reasonable and will enable Cedar to maximize the value of its estate. The Break-Up Fee is not excessive compared to fees and reimbursements approved in other cases in this Circuit nor will it diminish Cedar's estate. Bidding incentives such as the one proposed herein enable a debtor to assure a sale to a contractually committed bidder at a price that the debtor believes is fair and reasonable, while providing the debtor with the opportunity of obtaining even greater benefits for the estate through an auction process. Based on the time and effort spent by Cedar and Westrade in connection with due diligence and the negotiation of the Agreement, Cedar does not believe that the Break-Up Fee represents any windfall to Westrade, and believes that cause exists to approve the Break-Up Fee in connection with this transaction.

20. Based on the foregoing, Cedar requests that the Court approve the Break-Up Fee at the Procedures Hearing.

**B. Bidding Procedures**

21. Cedar also requests approval of bidding procedures in connection with this sale, which are fully set forth in the proposed Procedures Order annexed hereto as Exhibit "C". Cedar submits that the proposed procedures are reasonable and will ensure an orderly sale which is fair to Cedar, its creditors, Westrade and any third-party entity who wishes to participate in the



bidding. At the same time, the Procedures Order will eliminate any entity from bidding which lacks the financial ability to close under the Agreement.<sup>4</sup>

**C. Notice Provisions**

22. Federal Rule of Bankruptcy Procedure 2002(a) provides, in relevant part that:

- (a) Twenty-day notices to parties in interest. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days notice by mail of ...  
(2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice  
....

Fed. R. Bankr. P. 2002(a)(2).

23. Cedar proposes to serve notice of the Motion and the Procedures Hearing by serving a copy of the Notice Order and this Motion including all exhibits hereto, by overnight delivery service for next business day receipt upon: (a) The United States Trustee; (b) counsel to the Creditors= Committee; (c) counsel to the Agent for the Lenders; (d) Westrade=s counsel; (e) counsel to RiceCo; (f) all entities known to Cedar to have expressed an interest in the Property; (g) all non-Debtor parties to the LLC, Management and Services Agreements; and (h) all entities who have filed and served upon Cedar=s counsel a notice of appearance and request for papers in this case (collectively, the “Prime Recipients”).

24. Cedar further proposes to give notice of the Approval Hearing by serving a copy of the Procedures Order via first-class mail, postage prepaid, upon all Prime Recipients.

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<sup>4</sup> As part of the bidding procedures, Cedar requests that any competing bids start with a cash offer of at least \$250,000 higher than Westrade=s offer, to cover the Break-Up Fee and first incremental bid amount. Thereafter, Cedar proposes that subsequent cash bids be in increments of not less than \$100,000, and reserves the right to seek to increase the bidding increments at the Approval Hearing.

25. Cedar also proposes to publish notice of the Approval Hearing substantially in the form annexed to the Procedures Order as Exhibit “1” in the National Edition of *The New York Times* at least fifteen (15) days prior to the Approval Hearing.

26. Cedar submits that the time and manner of its proposal is reasonable, is typical of notice provisions in asset sales, and is permissible pursuant to sections 102, 105, 363(b), (f) and (m) and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, 9007 and 9008. To the extent that the notice of the Approval Hearing is ultimately less than the time required by Rule 2002, Cedar requests that notice be shortened accordingly pursuant to Rule 9006(1) for the reasons set forth herein.

27. Based on the foregoing, Cedar submits that, at the Procedures Hearing, the Procedures Order should be entered including both the Break-Up Fee and the bidding procedures and notice provisions discussed above, which Cedar submits are all fair, reasonable and necessary herein.

### **THE APPROVAL HEARING**

28. It is also requested that, at the Approval Hearing, the Court authorize a sale of the Property under section 363(b) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides that “[the] trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. ' 363(b)(1).

29. Section 363 does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor's assets prior to confirmation of a plan. However, courts in the Second Circuit and others have allowed a debtor to sell property of its estate outside of the ordinary course of its business, pursuant to section 363(b)(1) of the Bankruptcy Code, where the sale represents an exercise of the debtor's sound business judgment.

See In re Gucci, 126 F.3d 380, 387 (2d Cir. 1997) (“A sale of substantial part of a Chapter 11 estate may be conducted if a good business reason exists to support it”); In re Chateaugay Corp., 973 F.2d 141 (2d Cir. 1992) (recognizing that the sale of the debtors’ Assets pursuant to Section 363 was appropriate where the debtors “advanced good business reasons” for the sale and it was “a reasonable exercise of the debtors’ business judgment” to consummate the sale); Stephens Indus. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (“bankruptcy court can authorize a sale of all a Chapter 11 debtor’s assets under § 363(b)(1) when a sound business purpose dictates such action”); In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983) (the standard for bankruptcy court approval of a sale of assets under Section 363 is whether there is a “good business reason” for the sale); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991) (“The Second and Sixth Circuit Courts of Appeal require that the trustee show there is a sound business purpose for conducting the sale prior to confirmation of a plan.”); In re Phoenix Steel Corp., 82 B.R. 334, 33536 (Bankr. D. Del. 1987) (stating that judicial approval of a section 363 sale requires a showing that the proposed sale is fair and equitable, a good business reasons exists for completing the sale and that the transaction is in good faith); 3 *Collier on Bankruptcy & 363.02*[4] (15th ed. rev. 1997) (generally recognized that a sale of substantially all of the debtor’s assets can be accomplished pursuant to section 363(b)).

30. The “sound business purpose” test requires a debtor to establish four elements as a prerequisite to selling property outside the ordinary course of business. Specifically, a debtor must demonstrate that (a) a sound business justification exists for the sale of assets outside the ordinary course of business; (b) adequate and reasonable notice of the sale and hearing has been provided to interested persons; (c) the proposed sale price is fair and reasonable; and (d) the parties have acted in good faith. See e.g. In re Lionel Corp., 722 F. 2d at 1071 (noting that notice

is required by statute and finding that the debtor must provide some “articulated business justification” for the ‘363(b) sale); see also In re Abbotts Dairies of Penn, Inc., 788 F. 2d 143 (3rd Cir. 1986) (finding of good faith by purchaser is necessary to satisfy requirements of ‘363(m)); In re Titusville Country Club, 128 B.R. 396 (Bankr. W.D. Pa. 1991) (“sound business purpose” test has four requirements: (i) sound business reason for the sale; (ii) accurate and reasonable notice; (iii) adequate (fair and reasonable) price; and (iv) good faith); In re Delaware & Hudson Ry., *supra*, 124 B.R. at 176 (D. Del. 1991) (“sound business purpose” required for conducting a sale of the debtor’s assets prior to confirmation of a plan); Phoenix Steel, *supra*, 82 B.R. at 335-36 (requirements for approval of asset sale under Section 363 are that the proposed sale is fair and equitable, that there is a good business reason for completing the sale and the transaction is in good faith); 3 *Collier on Bankruptcy* §363.02[4] (15th ed. rev. 1997). Courts have made it clear that a debtor’s showing of a sound business justification need not be unduly exhaustive. Instead, a debtor is “simply required to justify the proposed disposition with sound business reason.” In re Baldwin United Corp., 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Cedar submits that its proposed sale satisfies the criteria set forth above and that the proposed sale of the Property is based upon its sound business judgment.

31. First and foremost, the sale of the Property is supported by compelling business reasons. Cedar is liquidating its assets for the benefit of its creditors. This is the last remaining significant asset to be liquidated and Cedar is receiving substantial value for the Property.

32. Furthermore, there is no purpose to be served by awaiting the confirmation of a chapter 11 plan before the Property is sold. Since Cedar is liquidating its assets, any chapter 11 plan would most likely require a disposition of the Property consistent with the relief being sought herein. Under the current approach, the value of the Property will be maximized on an

expedited basis, and a plan can then be promulgated and confirmed, incorporating the value received by Cedar from a disposition of the Property together with its other assets.

33. In addition, the proposed bidding procedures provide for appropriate notice and a hearing on the sale of the Property. The bidding procedures are designed to result in consideration to be paid by the successful bidder that would be fair and reasonable. Pursuant to the bidding procedures, Cedar will confirm the fairness of the sale price by soliciting higher or better offers for the Property. The bidding procedures thereby insure that Cedar's estate ultimately realizes the maximum available value for the Property and that the sale price is fair and reasonable.

34. The bidding procedures are also designed to ensure that the sale is an arms-length, good faith sale. Cedar will show at the Approval Hearing that the purchase of the Property is in good faith in accordance with section 363(m) of the Bankruptcy Code and was negotiated and proposed in good faith by Westrade or such other successful bidder and Cedar, and that no purchaser is an insider of Cedar as that term is defined in section 101(31) of the Bankruptcy Code, but an independent purchaser of the Property.

35. The proposed sale of the Property is in the best interests of Cedar's creditors and will be conducted pursuant to procedures that will ensure that the highest possible price is paid for the Property. Any delay in consummating a sale of the Property may diminish the current value of the Property and decrease the funds ultimately available for distribution to Cedar's creditors. Therefore, the creditors' best interests are served by authorizing Cedar to sell the Property pursuant to section 363 of the Bankruptcy Code and Cedar therefore requests that the Approval Order be entered in this regard.

**THE SALE SHOULD BE APPROVED PURSUANT TO SECTION 363(f)  
OF THE BANKRUPTCY CODE**

36. Section 363(f) of the Bankruptcy Code permits the sale of assets free and clear of liens, claims and encumbrances with any such liens, claims and encumbrances attaching to the proceeds of the sale. Section 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if **B**

(1) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and in the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in *bona fide* dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. ' 363(f).

37. Based on section 363(f), Cedar therefore requests authorization to sell the Property free and clear of any liens, claims and encumbrances, with such liens, claims and encumbrances to attached to the proceeds of the sale of the Property. Cedar's pre-petition Lenders hold a lien against substantially all of Cedar's assets, including the Property. The proceeds of the sale will therefore be paid to the Lenders and, upon information and belief, the Lenders consent to the sale. As a result of the Lenders' consent, the contemplated sale of the Property satisfies the requirements of section 363(f) of the Bankruptcy Code.

**THE ASSIGNMENT OF THE LLC AGREEMENT AND  
THE MANUFACTURING AGREEMENT TO WESTRADE, AND THE  
REJECTION OF THE SERVICES AGREEMENT, SHOULD BE APPROVED**

38. As set forth above, the Agreement provides for the assignment of the LLC Agreement and the Manufacturing Agreement to Westrade, and for the rejection of the Services Agreement. Cedar submits that all of this relief should be granted.

## A. Assumption and Assignment

39. The assumption and assignment of the LLC Agreement and the Manufacturing Agreement to Westrade is an integral part of the proposed sale. As to the LLC Agreement, such an assignment is clearly necessary if Cedar is to sell its interest in RiceCo to any purchaser. Moreover, the Manufacturing Agreement is itself an integral part of the transaction. That Agreement provides a significant benefit to Cedar and therefore to any assignee of Cedar, since Cedar's assignee would obtain the right to supply 50% of RiceCo's requirements for propanil. Because the Manufacturing Agreement is a major component of Cedar's interest in RiceCo, the Agreement is premised on the assumption of the Manufacturing Agreement in addition to the LLC Agreement.

40. Section 365(a) of the Bankruptcy Code<sup>5</sup> authorizes a debtor-in-possession to assume an executory contract or unexpired lease subject to the Bankruptcy Court's approval. Section 365(b) of the Bankruptcy Code<sup>6</sup> requires that the debtor-in-possession satisfy certain requirements at the time of assumption if a default exists under a contract to be assumed.

41. The decision as to whether an executory contract or unexpired lease should be assumed or rejected is based on the debtor's exercise of its business judgment. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (describing business judgment test as

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<sup>5</sup> Section 365(a) of the Bankruptcy Code provides:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b),(c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

<sup>6</sup> Section 365(b) of the Bankruptcy Code states, in relevant part:

(b)(1) If there has been a default in any executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

Attraditional®; In re III Enterprises, Inc. V, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) (citations omitted).

42. It is submitted that the requirements of section 365(b) are met here. First, the Debtor contends that there are no uncured breaches under the LLC Agreement or the Manufacturing Agreement which are required to be cured under section 365. As to the LLC Agreement, the only conceivable breach was Cedar's bankruptcy filing which, on its own, is insufficient to prevent an assumption and assignment of the LLC Agreement. As to the Manufacturing Agreement, as the Court was previously advised in connection with a motion by RiceCo to compel the termination of the Manufacturing Agreement and as set forth above, under the Manufacturing Agreement Cedar and Griffin each have the right to supply 50% of RiceCo's propanil requirements. If for any reason either such member is unable to supply its propanil requirement, the other member has the right to supply the short-fall to RiceCo. If the other member chooses not to supply some or all of the short-fall, the original non-producing party may obtain it from the marketplace and supply it to RiceCo. As the Court was also previously advised, rather than giving Cedar notice of default under the Manufacturing Agreement for any failure to supply propanil, which would have enabled Cedar to obtain propanil from the marketplace and supply it to RiceCo in the event Griffin declined to produce the propanil itself, Griffin itself either supplied the propanil or obtained it from the marketplace and provided it to RiceCo and/or RiceCo itself procured it from the market. Thus, it is Cedar's contention that there is no uncured breach or damages since, essentially, any breach, if at all, was cured by Griffin and RiceCo themselves. Based on this, Cedar again submits that there are no uncured breaches under the Manufacturing Agreement required to be cured under section 365 of the Bankruptcy Code.



43. Moreover, the Debtor believes that Westrade can clearly satisfy the requirements of adequate assurance of future performance under the LLC and Manufacturing Agreements. First, it should be noted that Westrade at one time owned an interest in RiceCo before it was sold to Griffin. As a result, Westrade is fully familiar with the business and the operations of RiceCo and is more than capable of satisfying its obligations under the LLC Agreement. Furthermore, Westrade and its affiliates have been major participants in the propanil industry and have the experience and facilities to be leading suppliers of propanil. Thus, Westrade can certainly satisfy its performance obligations under the Manufacturing Agreement.

44. Based on the foregoing, it is therefore submitted that the LLC Agreement and the Manufacturing Agreement should both be assumed and assigned to Westrade and that the standards for doing so under section 365 of the Bankruptcy Code are established in this case.

## **B. Rejection**

45. The Agreement further provides for the rejection of the Services Agreement. As set forth above, under the Services Agreement, Cedar provided management and administrative services to RiceCo at the premises occupied by Cedar and RiceCo in Memphis, Tennessee.

46. The legal requirements for rejection of an executory contract are set forth above. It is submitted that it is in the best interest of Cedar's estate, and in the sound exercise of Cedar's business judgment, to reject the Services Agreement.

47. Cedar is no longer operating and maintains only a very small portion of its original corporate office premises. Cedar's staff is now virtually non-existent as well. Cedar, therefore, is no longer capable of performing its obligations under the Services Agreement. Westrade will not be operating out of the Memphis, Tennessee premises and does not desire to provide the management and administrative services previously provided by Cedar under the

Services Agreement. However, since the Services Agreement forms a part of the LLC Agreement, it is necessary that it be rejected. It should be noted that Cedar will not be prejudiced by the rejection of the Services Agreement since it has no value to the estate and Cedar will not be performing under the Services Agreement in any event. Therefore, it is submitted that the Services Agreement should be rejected in the exercise of Cedar's business judgment.

**EXEMPTION OF SALE FROM  
BANKRUPTCY RULES 6004(g) AND 6006(d)**

48. It is important that the asset sale proceed expeditiously, and Cedar and Westrade therefore intend to consummate the sale as soon as possible after entry of the Approval Order. As set forth above, the terms of this sale are fair, reasonable and in the best interest of the estate, and Westrade or such other successful bidder will be entitled to the protections of section 363(m) of the Bankruptcy Code.

49. Accordingly, Cedar is hereby requesting that the Approval Order not be stayed pursuant to, and that the Court waive the provisions of, Bankruptcy Rules 6004(g) and 6006(d).

**REQUEST FOR EXPEDITED RELIEF**

50. Cedar requests that the Court schedule both the Procedures Hearing and the Approval Hearing on an expedited basis. The timing of the Approval Hearing is of critical concern to Westrade. Because of this, the Agreement is conditioned on obtaining the Approval Order by March 22, 2003. It is therefore requested that in order to meet that time criteria, this process occur on an expedited basis.

## **MEMORANDUM OF LAW**

51. Cedar submits that the relevant legal authorities are set forth herein, that no new or novel issues are involved, and therefore requests that the requirement set forth in the local rules for submission of a memorandum be otherwise waived.

## **NO PRIOR REQUEST**

52. No previous request for the relief sought herein has been made to this or any other Court.

WHEREFORE, Cedar respectfully requests that the Court (i) enter the Notice Order, substantially in the form annexed hereto as Exhibit AA@, (ii) enter the Procedures Order, substantially in the form annexed hereto as Exhibit AC@, after the Procedures Hearing; (iii) enter the Approval Order, substantially in the form annexed hereto as Exhibit AD@, after the Approval Hearing; and (iv) grant Cedar such other relief as is just and proper.

Dated: New York, New York  
February 10, 2003

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Debtors and Debtors-in-Possession

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